IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 1251 OF 2006.
IN
CRIMINAL APPEAL NO. 357 OF 1994.

Ali Mehboob Shaikh and others. ... Applicants.
Versus.
The State of Maharashtra. ... Respondent.

Shri S.R.Chitnis, Senior Counsel with Smt.V.R.Raje for the Applicants.

Shri A.S.Shitole, A.P.P. for the Respondent.

CORAM : ABHAY S.OKA, J.

DATED : 22nd December, 2006.

P.C.:

1. Submissions of the learned Counsel appearing for the parties are heard. The prayer in this Application is for suspension of order of conviction and sentence on the ground that the Applicant No.4 desires to contest election of the Municipal Corporation. The conviction of the Applicant No.4 is for an offence under section 307 read with section 34 of the Indian Penal Code. The substantive sentence is R.I. for 3 years.

2. Shri Chitnis, the learned Senior Counsel for the Applicants submitted that there is gross delay of more than 9 months in lodging the F.I.R. He pointed out that the alleged incident is of 2nd February 1992. Admittedly the Complainant/injured was an accused on bail who could not have entered the Dehu Road in view of the conditions imposed by the concerned Court while

granting bail. He pointed out that while getting himself admitted in hospital, the Complainant gave a fictitious name. Moreover no F.I.R. was lodged. The F.I.R. was lodged only after the Complainant was arrested and was brought to the Police Station on 31st December 1992. He, therefore, submitted that the order of suspension deserves to be granted as the Applicant No.4 will unnecessarily incur disqualification. He placed reliance on the decision of this Court in the case of Laxman Malhari Sable v/s. State of Maharashtra (1997(2) Mah.L.J. 780). He placed reliance on the paragraph 10 of the said decision. The learned A.P.P. opposed the application by pointing out that the first informant sustained about 13 injuries.

3. A perusal of the decision of the Division Bench in the case of Laxman Malhari Sable (supra) shows that reliance was placed on the decision of the Apex Court in the case of Rama Narang v/s. Ramesh Narang and others (1995(2) S.C.C. 513). Relying upon the said decision, the Division Bench suspended the sentence only on the ground that the Applicant before it will be subjected to disqualification as a result of order of conviction.

4. After the said decision, the Apex Court in the case of K.C.Sareen v/s. CBI, Chandigarh [(2001) 6 SCC 584] had an occasion to deal with the power of the Court

under section 389(1) of the Code of Criminal Procedure, 1973 to suspend the conviction. Shri Chitnis, the learned Senior Counsel tried to submit that the ratio of the said decision will apply only to a case where conviction is under the Prevention of Corruption Act, 1988. However, the said submission cannot be accepted as a perusal of paragraphs 10 and 11 of the said decision of the Apex Court shows that the Apex Court has interpreted its earlier decision in Rama Narang (supra). After considering the said decision, in paragraph 11 the Apex Court held thus:

> "11. **The legal position, therefore, is this: though the power to suspend an order of conviction, apart from the order or sentence, is not alien to section 389(1) of the Code, its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal in challenge of the conviction the court should not suspend the operation of the order of conviction. The court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance.** It is in the light of the above legal position that we have to examine the question as to what should be the position when a public servant is convicted of

> an offence under the PC Act. No doubt when the appellate court admits the appeal filed in challenge of the conviction and sentence for the offence under the PC Act, the superior court should normally suspend the sentence of imprisonment until disposal of the appeal, because refusal thereof would render the very appeal otiose unless such appeal could be heard soon after the filing of the appeal. But suspension of conviction of the offence under the PC Act, dehors the sentence of imprisonment as a sequel thereto, is a different matter."

Thus it is clear that merely because there is a power vesting in the Court to suspend the conviction, the same cannot be mechanically exercised only on the ground that the concerned accused will incur disqualification. As held by the Apex Court, exercise of power has to be limited to very exceptional cases and merely because convicted person files an appeal challenging the order of conviction, the Court should not suspend the order of conviction. The Court has a duty to look at all the aspects including the ramifications of keeping such conviction in abeyance. In view of the subsequent pronouncement of law, the present Application will have to be decided in accordance with the said decision in

the case of K.C.Sareen (supra).

5. Therefore, as held by the Apex Court in the case of K.C.Sareen (supra), it will have to be considered whether an exceptional case is made out by the Applicant No.4. For deciding whether an exceptional case is made out or not, it is necessary to look into all the aspects of the case.

6. The conviction of the Applicant No.4 and other co-accused is under the Judgment and Order dated 9th May 1994 for offence punishable under section 307 read with section 34 of the Indian Penal Code.

7. I have perused the paper book of the appeal. According to the case of the prosecution, on 2nd February 1992, there was an election of the Cantonment Board at Dehu Road, Pune. The injured person and the first informant is one Raju Kanadi. According to the prosecution case, one Amin Shaikh (Accused No.4 herein) contested the said election. According to the prosecution case, the Applicant No.3 (Accused No.3) and his friend asked Raju to make propaganda in favour of the Applicant No.4 during the said election. However, Raju declined to do so. In the evening on the same day, the Applicants arrived at the house of the parents of Raju. According to the prosecution, the Applicants

assaulted Raju by dagger, chopper and sword, as a result of which Raju sustained about 13 injuries.

8. It is not in dispute that the victim Raju was arrested in connection with a case under TADA Act and at the relevant time, he was enjoying the facility of bail. It is also an admitted position that the bail was granted in favour of said Raju on the condition that he should remain away at a distance of 70 km from Dehu Road. It is also an admitted position that even according to the prosecution case, on 2nd February 1992 the said Raju entered Dehu Road in breach of the condition imposed by the Designated Court granting bail in his favour. The said Raju (P.W.8) has stated as to how the Applicants assaulted him in the house of his parents.

9. It is an admitted position that P.W.8 Raju was admitted at Hardikar Hospital at Pune on the same day. The evidence of Dr.Ashwin Parekh (P.W.No.2) attached to Hardikar Hospital shows that at the time of admission, P.W.8 Raju gave his name as Prakash Anand Reddy. The evidence of Dr.Parekh discloses that on 7th February 1992 he became aware about the real name of P.W.8. He stated that he called the Police for protection of other patients. In fact he candidly admitted that he informed the Police

that the case was a medico-legal case. Surprisingly F.I.R. was not registered. On 30th December 1992 i.e. almost after 10 months, P.W.8 Raju was arrested by the Police and was brought to the Dehu Road Police Station and in the Police Station his F.I.R. was recorded against the Applicants. The evidence of P.W.2 Dr.Parekh discloses that the Police were all along aware that P.W.8 Raju got himself admitted in the hospital on 2nd February 1992 by giving a fictitious name. Within few days of the admission in hospital, the Police were made aware of the correct name of P.W.8 and the Police were called in the Hospital to protect the other patients from P.W.8. A perusal of the notes of evidence shows that except for close blood relations of P.W.8, none of the prosecution witnesses have supported the prosecution except P.W.7 Shantilal Solanki. The evidence of P.W.7 shows that his knowledge of the incident is based only on what P.W.8 had disclosed to him and he is not at all an eye witness. After registration of F.I.R., on 31st December 1992, Raju was sent for medical examination and 13 injuries were found on his person. Medical examination has been done 10 months after the alleged date of incident.

10. It will also be necessary to refer to the evidence of P.W.8. Paragraph 5 of his evidence shows that he has made major improvements in his case. P.W.9,

the Investigating Officer has stated that P.W.8 was arrested and brought to the Police Station as he committed breach of the conditions of bail which was granted by the TADA Court. He admitted that F.I.R. was recorded on 30th December 1992 after the P.W.8 was arrested and brought to the Police Station. On the basis of the said F.I.R., the Applicant No.2 was arrested on 5th January 1993. Applicant No.4 (Accused No.4) was arrested on 22nd January 1993 and his house was searched on that day. The statements of witnesses were recorded in February 1993 i.e. one year after the incident.

11. The finding of the learned trial Judge is that there was sufficient explanation for the delay. Prima-facie, it appears to me that as to what is that sufficient explanation is not stated in the impugned Judgment.

12. In my view, following are the striking features of the case which bring the case within the purview of a very exceptional case:

i) The injured first informant himself had entered the City of Dehu Road in breach of the conditions imposed while granting bail in his favour in a TADA case.

ii) When he was admitted at Hardikar Hospital at Pune on the date of incident, he gave a fictitious name to the Hospital Authorities.

iii) On 2nd February 1992 itself the hospital authorities had informed the Police about the medico-legal case.

iv) On 7th February 1992, the real name of the first informant was disclosed and in fact hospital authorities had called police for protection of other patients.

v) F.I.R. was registered belatedly on 30th December 1992 only after the first informant was arrested on account of breach of terms and conditions of bail and the F.I.R. was lodged when he was under arrest in the Police Station. There is no explanation at all as to why the first informant made no efforts to lodge a complaint for nearly ten months. The Police Authorities also did not register an offence though on 2nd February 1992 they were aware of the injuries sustained by the

Applicant.

vi) None of the prosecution witnesses except the first informant and the close relatives of the first informant have supported the prosecution.

13. The substantive sentence in this case is of three years. There is hardly any explanation for delay in lodging the F.I.R. The consequence of the substantive sentence is that the Applicant No.4 will be prevented from contesting the elections. Looking to very extra-ordinary features of the case, this certainly is an exceptional case where the prayer of the Applicant No.4 will have to be considered. In my view, the case is covered by paragraph 11 of the decision of the Apex Court in the case of K.S.Sareen (supra).

14. Hence the Application is disposed of by the following order:

"The conviction and sentence of the Applicant No.4 shall remain suspended till the disposal of the Appeal."

Judge.